IT IS SO ORDERED.

Beth A. Buchanan
Beth A. Buchanan
United States Bankruptcy Judge

Dated: September 27, 2011

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

In Re	)	
	)	
NATHAN MICHAEL GARVEY	)	**Case No. 11-10160**
SARA BROCKMAN GARVEY	)	**Chapter 7**
	)	**Judge Buchanan**
Debtor	)	

ORDER OVERRULING TRUSTEE'S OBJECTION TO DEBTOR'S EXEMPTION

The issue before this Court is whether two custodial individual retirement accounts funded with money from the Debtor's mother over ten years ago are exempt pursuant to 11 U.S.C. §522(b)(3)(C). For the reasons stated below, this Court concludes that the custodial individual retirement accounts are exempt.

I. Facts and Procedural Background.

On April 9, 1999, Debtor Nathan Michael Garvey's (the "Debtor") mother, through her financial advisor at NFP Securities, opened a custodial individual retirement account in the Debtor's name; the money was invested in a mutual fund at American Funds (the "American Funds Account"). On April 6, 2000, the Debtor's mother, again through her financial advisor at NFP Securities, opened another custodial individual retirement account in the Debtor's name; the money was invested in a mutual fund at Fidelity Investments (the "Fidelity Account").[1] As of the petition filing date, the balance in the American Funds Account was $1,731.23 and the balance in the Fidelity Account was $6,262.03.

[1] Collectively, the American Funds Account and the Fidelity Account are referred to as the "IRA Accounts."

The Debtor claimed the IRA Accounts as exempt in their entirety pursuant to Section 522(b)(3)(C) of Title 11 of the United States Code (the "Bankruptcy Code"). *See Amended Schedule C – Property Claimed As Exempt* [Docket Number 21]. The Chapter 7 Trustee, Norman L. Slutsky (the "Trustee"), filed an objection to the Debtor's claimed exemption in the IRA Accounts asserting, without explanation, that the IRA Accounts "are not exempt under the facts of this case." *See Trustee's Objection to Claim of Exemption* [Docket Number 22] (the "Objection"). The Debtor filed a response [Docket Number 37] to the Objection stating that the IRA Accounts were "gifted" to the Debtor by his mother and contending that, because the IRA Accounts were exempt from taxation, the IRA Accounts met the criteria to be exempt assets under Section 522(b)(3)(C) of the Bankruptcy Code. The Debtor relied on *In re Kuchta*, 434 B.R. 837 (Bankr. N.D. Ohio 2010), which held that funds in an inherited IRA were exempt under 11 U.S.C. §522(b)(3)(C).

This Court entered a scheduling order [Docket Number 38] setting the matter for hearing and requiring the parties to file briefs in support of their respective positions. Only the Debtor complied with the scheduling order and filed a brief in support of the Debtor's position. *See Brief in Support of Exemptions* [Docket Number 36]. A hearing was held on July 28, 2011. Subsequent to the hearing, the Debtor submitted a confirmation statement from the American Funds Account showing the account to be a "CB&T Cust IRA" and a confirmation statement from the Fidelity Account showing the account to be a "FMTC CUSTODIAN ROTH IRA."[2]

II. Discussion.

While Ohio has "opted-out" of the federal exemptions, Section 522(b)(3)(C) of the Bankruptcy Code nonetheless provides a federal exemption to Ohio debtors for certain retirement funds. Specifically, Section 522(b)(3)(C) of the Bankruptcy Code allows a debtor to exempt from property of the estate "retirement funds to the extent that those funds are in a fund or account that is exempt from taxation under section 401, 403, 408, 408A, 414, 457 or 501(a) of the Internal Revenue Code of 1986" are exempt. 11 U.S.C. §522(b)(3)(C).

Section 408 of the Internal Revenue Code is titled "Individual retirement accounts" and Section 408A of the Internal Revenue Code is titled "Roth IRAs." On his Amended Schedule C, the Debtor refers to both IRA Accounts as Roth individual retirement accounts. The investment account statement for the Fidelity Account expressly states that the Fidelity Account is a custodial Roth IRA while the investment account statement for the American Funds Account refers to the American Funds Account as simply a custodial IRA. Although this Court cannot determine from the limited evidence before it whether or not the American Funds Account is an individual retirement account or a Roth individual retirement account, the difference is not material since both types of accounts are exempt under Section 522(b)(3)(C) of the Bankruptcy Code.

For a debtor to claim an exemption under Section 522(b)(3)(C) of the Bankruptcy Code, "(1) the amount that the debtor seeks to exempt must be retirement funds; and (2) the retirement funds must be in an account that is exempt from taxation under one of the provisions of the Internal Revenue Code [referenced in Section 522(b)(3)(C) of the Bankruptcy Code]." *See Doeling v. Nessa (In re Nessa),* 426 B.R. 312, 314 (B.A.P. 8th Cir. 2010) (interpreting the

[2] The Debtor was granted leave at the hearing to supplement the record with additional documentation regarding the nature of the IRA Accounts. The Trustee did not respond to the additional documentation submitted by the Debtor nor did the Trustee otherwise supplement his position.

identical provision under Section 522(d)(12) of the Bankruptcy Code); *see also*, *In re Kuchta,* 434 B.R. at 843 ("the only question is whether the funds are retirement funds in an account that is exempt under the relevant Internal Revenue Code provisions.").

At the hearing, the Trustee explained his legal position to be that the IRA Accounts are not exempt because the Debtor's mother was the source of the funds, and therefore, the IRA Accounts are not individual retirement accounts under the Internal Revenue Code. The Trustee admitted that he could find no statutory provision in the Internal Revenue Code in support of his position. The Trustee has not challenged any other aspects of the IRA Accounts that might relate to their validity as either "Individual retirement accounts" or "Roth IRAs" under the Internal Revenue Code. Thus, the narrow issue before the Court is whether the source of the investment funds as being from someone other than the Debtor somehow renders the IRA Accounts something other than "Individual retirement accounts" or "Roth IRAs" under the Internal Revenue Code.

The Trustee bears the burden to prove, by a preponderance of the evidence, that the exemptions are not properly claimed. Fed. R. Bankr. P. 4003(c); *In re Hamo,* 233 B.R. 718, 723 (B.A.P. 6th Cir. 1999). Exemptions are to be construed broadly in favor of the Debtor. *In re Peacock,* 292 B.R. 593, 595 (Bankr. S. D. Ohio 2002).

The Trustee did not present any statutory or case law authority that the Internal Revenue Code prohibits someone other than the owner of an individual retirement account from making a deposit into another's individual retirement account. Nor did the Trustee present any statutory or case law authority that the Internal Revenue Code requires the owner of an individual retirement account to make deposits of the owner's own money into the account.

To the contrary, the Internal Revenue Code permits a parent or guardian of a child to establish an individual retirement account or Roth IRA on behalf of the child. *See* 64 Fed. Reg. 5597, 5598; released in T.D. 8816 (Feb. 3, 1999) (stating in the preamble to the final regulations relating to Roth IRA under section 408A of the Internal Revenue Code that "the IRS and the Treasury intend that the rules for traditional IRAs also apply to Roth IRAs. Thus, for example, a parent or guardian of a minor child may establish a Roth IRA on behalf of the minor child."); *see also,* Pond, PERSONAL FINANCIAL PLANNING HANDBOOK, ¶ 11.07[5][f] *Custodial IRAs* (2nd Ed. 2011) ("Many financial institutions permit a parent to open a custodial IRA for a child, either traditional or Roth IRA.").

The parent or guardian may even contribute his or her own money to fund an individual retirement account or Roth IRA for a child; the only restriction is the parent or guardian may contribute only the amount of the child's earned income up to the statutory maximum annual contribution limits.[3] *See,* 64 Fed. Reg. at 5598; Richard E. Coppage and Lisa M. Blum, *Child's Roth IRA,* 82 Practical Tax Strategies 212, 215 (April 2009) ("If the child has earned income (wages), a parent can give money to help fund the [Roth IRA] contribution."); Kent Schneider, *The Kiddie Tax Goes to College,* 63 J. Mo. B. 300, 303 (Nov.-Dec. 2007) ("If a child has earned income, the parents could reimburse the child for contributions to the child's Roth IRA."); Doug Lockwood, *How to Use a Roth IRA to Build an Inheritance,* U.S. News & World Report (Mar. 28, 2011) ("There is no minimum age requirement for opening a Roth IRA, and many IRA providers will open accounts for minors. In most cases, the only real issue is whether the child

[3] The Trustee did not assert that the contributions to the IRA Accounts exceeded the maximum contributions allowable under the Internal Revenue Code so this Court need not address that issue.

has taxable earned income. Fortunately there is no requirement that the same "earned income" is the money that funds the IRA. If your child earned income from a summer or part-time job, but then spent it, there is no restriction on using money provided by parents to establish and fund the IRA account.").

Even though the contributions to the individual retirement account or Roth IRA may be made by a parent or guardian, the funds in the child's individual retirement account or Roth IRA belong to the child and the child may continue to hold the funds in the account as retirement savings. *See* Pond, PERSONAL FINANCIAL PLANNING HANDBOOK, ¶ 11.07[5][f] *Custodial IRAs* (2nd Ed. 2011) ("A parent or guardian manages the custodial IRA account for the benefit of the child. Funds in the account are considered an irrevocable gift and belong to the child . . ."). Accordingly, the fact that the Debtor's mother deposited funds into the IRA Accounts is immaterial to the determination of whether the IRA Accounts are exempt under Section 522(b)(3)(C) of the Bankruptcy Code.

In view of the lack of legal authority cited by the Trustee in support of his position, the procedural burden of proof residing with the Trustee, and the guiding principle that exemptions are to be broadly construed in favor of the debtor, the Trustee's Objection is OVERRULED.

IT IS SO ORDERED.

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